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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 8[illegible]

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a minor; VALERY STRATTON, a minor; SAMUEL E. STRATTON; LORRAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,

Respondents.

Petition for Writ of Certiorari to the Illinois Appellate Court (Second District)

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INDEX.

	PAGE
Opinion Below	2
Jurisdiction	3
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	5
Reasons for Granting the Writ	9
Conclusion	15
Appendices:	
A—Opinion Below	1a
B—Opinion in Farmers Mutual Automobile Insurance Company vs. Janusick	21a
C—Judgment of Illinois Appellate Court (2nd District)	30a
D—Illinois Supreme Court, Denial of Petition for Leave to Appeal	32a
E—Verified Motion to Reconsider Denial of Petition for Leave to Appeal	34a
F—Illinois Supreme Court Order Denying Motion to Reconsider Denial of Petition for Leave to Appeal	39a
G—Illinois Declaratory Judgment Act	41a

CITATIONS

Cases:

Backus v. Fort St. Union Depot Co., 169 U.S. 557, 569, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445	12
Barbier v. Connolly, 113 U.S. 27, 28 L. ed. 923, 924, 925, 5 Sup. Ct. Rep. 357	11

Bolling v. Sharpe, 347 U.S. 497, 499, 98 L. ed. 884, 886, 74 Sup. Ct. Rep. 693 14
Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L. ed. 2d 45, 52, 81 Sup. Ct. Rep. — 13
Fidelity & Columbia Trust Company v. City of Louisville, 245 U.S. 54, 59, 60, 62 L. ed. 145, 149, 39 Sup. Ct. Rep. 40 12
Frost v. Corporation Commission, 278 U.S. 515, 522, 73 L. ed. 483, 488, 49 Sup. Ct. Rep. 235 10
Hill v. Texas, 316 U.S. 400, 406, 86 L. ed. 1559, 1563, 62 Sup. Ct. Rep. 1159 13
Jones v. Securities and Exch. Comm., 298 U.S. 1, 24, 80 L. ed. 1015, 1025, 56 Sup. Ct. Rep. 654 13
Louisville Gas & E. Co. v. Coleman, 277 U.S. 32, 37, 72 L. ed. 770, 774, 48 Sup. Ct. 423 ..... 10, 13
Maxwell v. Bugby, 250 U.S. 525, 541, 63 L. ed. 1124, 1132, 40 Sup. Ct. Rep. 2 10
Milwaukee E. R. & L. Co. v. Wisconsin, 252 U.S. 100, 105, 64 L. ed. 476, 480, 40 Sup. Ct. Rep. 306 .. 12
Morey v. Doud, 354 U.S. 457, 464, 1 L. ed. 2d 1485, 1490, 1491, 77 Sup. Ct. Rep. 1344 13
Southern R. Co. v. Greene, 216 U.S. 400, 412, 54 L. ed. 538, 539, 30 Sup. Ct. Rep. 287 10
Farmers Automobile Ins. Ass'n. v. Janusick, 30 Ill. App. 2d 353 ..... 2, 7

Constitution:

United States Constitution, Fourteenth Amendment, section 1 4

Statutes:

Title 28, U.S.C.A., section 1257(3) 3
Chapter 77, Illinois Rev. Stat., 1959, section 83 ..... 8, 13
Chapter 110, Ill. Rev. Stat., 1959, section 57.1 ..... 4, 41a
Chapter 110, Ill. Rev. Stat., 1959, section 74 12
Chapter 110, Ill. Rev. Stat., 1959, section 201.14 12

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W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a minor; VALERY STRATTON, a minor; SAMUEL E. STRATTON; LORRAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,

Respondents.

Petition for Writ of Certiorari to the Illinois Appellate Court (Second District)

State Farm Mutual Automobile Insurance Company, prays that a Writ of Certiorari issue to review the judgment of the Illinois Appellate Court (Second District) entered on April 4, 1961. A petition for leave to appeal was denied by the Illinois Supreme Court on May 18, 1961 and a verified motion to reconsider the denial of the petition for leave to appeal was denied by the Illinois Supreme

Court on June 6, 1961. The Illinois Appellate Court (Second District) affirmed the trial court's dismissal of petitioner's complaint for declaratory judgment, which sought an adjudication of its insurance coverage, while, at the same time, in another case wherein the factual situation was identical, the same Court reversed the trial court's dismissal (made upon the same ground) holding that the plaintiff insurer in that case was entitled to an adjudication of its insurance coverage by way of declaratory judgment as a matter of right.

OPINION BELOW.

The opinion of the Illinois Appellate Court (Second District) filed April 4, 1961 is set forth in Appendix A, *infra* p. 1a and is reported at 29 Ill. App. 2d 451, ... N.E. 2d .....

The opinion of the Illinois Appellate Court (Second District) filed April 4, 1961 (rehearing denied June 5, 1961) in the companion case of *Farmers Automobile Insurance Ass'n* v. *Janusick,* is set forth in Appendix B, *infra* p. 21a and is reported at 30 Ill. App. 2d 352, ... N.E. 2d .....

JURISDICTION.

The judgment of the Illinois Appellate Court (Second District) was entered on April 4, 1961 (Appendix C, *infra* p. 30a). Petition for leave to appeal was denied on May 18, 1961 by the Illinois Supreme Court (Appendix D, *infra* p. 32a). Petitioner's motion to reconsider denial of its petition for leave to appeal (Appendix E, *infra* p. 34a) was denied by the Illinois Supreme Court on June 6, 1961 (Appendix F, *infra* p. 39a).

The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1257(3).

QUESTIONS PRESENTED.

1. Can the same court at the same time grant a right of action to one and deny the same right of action to another identically situated without depriving the latter of "equal protection of the law"?

2. Where one has been denied "equal protection of the law" by a state court and seeks the protection of its constitutional rights by the highest court of the state, may such court, if it is the only court having jurisdiction to grant relief, ignore the deprivation of the constitutional right as a matter of discretion or does it have a mandatory duty to grant relief?

3. Is the granting of a right of action to one as a matter of right and, at the same time, denying the same right of action to another who is identically situated such denial of equality under the law as to constitute lack of "due process of law?"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

A). Amendment XIV to the Constitution of the United States, Sec. 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

B). Illinois Declaratory Judgment Act, Chap. 110, Ill. Rev. Stat. 1959, sec. 57.1 (Appendix G, *infra* p. 41a).

STATEMENT OF THE CASE.

(Numerals in parentheses refer to appendix pages)

On August 22, 1959, petitioner, State Farm Mutual Automobile Insurance Company had issued its automobile insurance policies to respondent, W. Terrill Morris, insuring his Plymouth and Chevrolet automobiles and any other non-owned automobile driven by him or a relative who was a member of his household unless such other non-owned automobile was furnished for regular use to him or a member of his household. The respondent Juanita Morris is the daughter of W. Terrill Morris and a member of his household. On August 22, 1959, Juanita Morris was involved in a collision while driving a Ford Thunderbird automobile owned by respondent John H. Swanson. All of the respondents claimed benefits under Petitioner's aforesaid insurance policies as a result of this collision. Petitioner claims that the Ford Thunderbird automobile was a non-owned automobile furnished for regular use to Juanita Morris and therefore, excluded from coverage by the terms of the aforesaid policies. Petitioner filed the above entitled declaratory judgment action seeking a determination of whether its policies covered the automobile involved in the aforesaid collision. After all of the respondents had appeared and answered petitioner's complaint, several of the respondents commenced common law tort actions, to which petitioner was not a party, seeking damages alleged to have occurred as a result of the aforesaid collision. Thereafter all but one of the respondents moved to strike petitioner's complaint and dismiss the declaratory judgment action on the ground that petitioner's action was premature and its rights could not be

adjudicated until after judgment had been entered in the damage suits. The motion to dismiss was granted by the trial court and petitioner prosecuted its appeal to the Illinois Appellate Court (Second District). (p. 6a).

On April 4, 1961, the Illinois Appellate Court (Second District) affirmed the trial court's dismissal of petitioner's action for declaratory judgment holding that petitioner had no right to a declaratory judgment action and the trial court, in its discretion, properly required petitioner to await being sued in garnishment following judgments being awarded in the common law tort actions (Appendix A, *infra* pp. 19a-20a and Appendix C, *infra* pp. 30a-31a).

Thereafter, petitioner filed its petition for leave to appeal to the Illinois Supreme Court. The petition for leave to appeal was denied on May 18, 1961. (Appendix D, *infra* pp. 32a-33a).

After the denial of petitioner's petition for leave to appeal to the Illinois Supreme Court, petitioner learned that on the same day the Illinois Appellate Court (Second District) had denied the right of action for declaratory judgment to petitioner, the same Court had granted the right of action as a matter of right to an insurer in a case wherein the material facts were identical to petitioner's case. The latter case is entitled *Farmers Automobile Ins. Ass'n* v. *Janusick*; it also having been decided on April 4, 1961. In the *Janusick* case the facts showed that as of September 17, 1958, the Farmers Automobile Insurance Association had issued its insurance policy to Cletus Janusick insuring a certain 1953 Oldsmobile and any other automobile operated by him which was acquired to replace that vehicle. On that date Janusick was involved in a collision while operating a 1952 Oldsmobile. As a

result of this collision common law tort actions were commenced against Janusick. On March 19, 1959, the Farmers Automobile Insurance Association commenced its action for declaratory judgment against Janusick and all those who claimed benefits under Janusick's insurance policy. In its declaratory judgment suit the Farmers Automobile Insurance Association claimed that the 1952 Oldsmobile involved in the collision was not a replacement for the 1953 Oldsmobile described in its policy and, therefore, was excluded from coverage. In that action a motion to dismiss was filed based on the ground that the action was premature and that the Farmers Automobile Insurance Association could not have its rights adjudicated until after a judgment for damages was entered in the common law actions. The trial court granted the motion and dismissed the action. (pp. 22a-23a). Thereafter, the Farmers Automobile Insurance Association prosecuted its appeal to the Illinois Appellate Court (Second District) which, on April 4, 1961, reversed the trial court's dismissal, holding:

> "Applying these principles to the case at bar, we believe that the insurance carrier had a right to file its complaint for a declaratory judgment prior to the time that the injured third persons obtained a judgment against the insured, and that the circuit court erred in dismissing the complaint on the ground that it was premature." (p. 28a).

The petition for rehearing in that case was denied on June 5, 1961 (see: *Farmers Automobile Ins. Ass'n* v. *Janusick*, 30 Ill. App. 2d 352).

Upon learning of the discriminatory and contradictory holdings by the Illinois Appellate Court (Second District) on the same day, petitioner, within the time provided by

law,(1) raised the federal question for the first time by way of its verified Motion to Reconsider Denial Of The Petition For Leave To Appeal. Petitioner attached to its motion, and incorporated by reference, certified copies of the two contradictory and discriminatory opinions of the Illinois Appellate Court (Second District) filed on April 4, 1961 (Appendix E, *infra* pp. 34a-38a). As grounds for this motion, petitioner claimed that it had been deprived of due process of law and the equal protection of law in violation of the Fourteenth Amendment of the United States Constitution, section 1, the benefits of which it invoked and claimed (p. 36a). Petitioner, in its verified motion also set forth that it had first learned of the ruling in the *Janusick* case subsequent to the denial of its Petition For Leave to Appeal (p. 35a). The Motion To Reconsider The Denial Of The Petition For Leave To Appeal was denied by the Illinois Supreme Court on June 6, 1961 (Appendix F, *infra* p. 39a).

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(1) Chapter 77, Ill. Rev. Stat., 1959, sec. 83 provides:

> "Any such judgment, decree or order may hereafter be modified, set aside or vacated prior to the expiration of thirty days from the date of its rendition or in pursuance of a motion made within such thirty days wherever, under the law heretofore in force, it might have been set aside or vacated prior to the expiration of the term of court at which it was rendered or in pursuance of a motion made at that term (1933, June 21, Laws 1933, p. 678, sec. 2)."

REASONS FOR GRANTING THE WRIT.

A review of the opinions of the Illinois Appellate Court (Second District) in the instant case and in the *Farmers Automobile Insurance Association* v. *Janusick* case shows that in each case the insurer was identically situated. In both cases the insurer was confronted with a situation where the person with whom they had an insurance contract was involved in a collision while driving vehicles which apparently were excluded from coverage under their respective policies. In both cases the insurers commenced actions under the Illinois Declaratory Judgment Act (Appendix G, *infra* pp. 41a-42a) in order to determine whether the claimants and the insured were entitled to the benefits provided in their policy. In each case the declaratory judgment action had been commenced prior to judgment having been awarded in the common law actions for damages. In each case a motion to dismiss the complaint was filed on the ground that the action was premature and that the insurer must wait until judgments were entered in the common law actions before the insurer's rights could be adjudicated and in each case the trial court dismissed the action on that ground. In each case appeals were taken to the Illinois Appellate Court (Second District). Up to this point each case was identical in all material respects. However, on the same day the Illinois Appellate Court (Second District) handed down two different judgments. In the instant case petitioner was denied a right of action under the Illinois Declaratory Judgment Act (Appendix G, *infra* pp. 41a-42a), while in the *Janusick* case the insurer was granted the right of action as a matter of right. Petitioner contends that this action

of the Illinois Appellate Court (Second District) in denying it a right of action and at the same time granting the same right of action, as a matter of right, to another who is identically situated, and the subsequent refusal of the Illinois Supreme Court to grant a review when apprised of the situation, is not in accord with the applicable decisions of this Court.

I. This Court has frequently held that the purpose of the "equal protection of the law" clause is to require that the rights of all persons in similar circumstances rest upon the same rule of law. *Frost* v. *Corporation Commission*, 278 U.S. 515, 522, 73 L. ed. 483, 488, 49 Sup. Ct. Rep. 235; *Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 37, 72 L. ed. 770, 774; 48 Sup. Ct. Rep. 423; *Maxwell* v. *Bugby*, 250 U.S. 525, 541, 63 L. ed. 1124, 1132; 40 Sup. Ct. Rep. 2; *Southern R. Co.* v. *Greene*, 216 U.S. 400, 412, 54 L. ed. 536, 539, 30 Sup. Ct. Rep. 287. Clearly, in the instant case the petitioner's rights were not founded upon the same rule of law as the rights of another insurer identically situated.

II. The effect of the discriminatory holding by the Illinois Appellate Court is not merely a discrimination of form. The denial of the right of access to the courts prior to judgment in common law damage actions to which petitioner is not a party requires petitioner to either expend large sums in carrying out obligations under its insurance contract when it might not be liable under its contract or refuse to do so at its peril. The insurer in the case of *Farmers Automobile Insurance Association* v. *Janusick*. (Appendix B, *infra* pp. 21a-29a) has had these obstacles removed by the decision in its case. That the action of the Illinois Appellate Court has deprived petitioner of the "equal protection of the law" is most clearly

illustrated when the interpretation of that clause by this Court is examined. In *Barbier* v. *Connolly*, 113 U.S. 27, 28 L. ed. 923, 924, 925, 5 Sup. Ct. Rep. 357, Mr. Justice Field, speaking for a unanimous Court, said:

> "The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediments should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offense."

When the action of the state court in the instant case is reviewed in the light of the foregoing statement of the intent and purpose of this constitutional guaranty, can it be said petitioner was afforded like access to the courts or that no impediments were interposed to the pursuits of petitioner which were different than those imposed on others under like circumstances, or that no greater burden is laid upon petitioner than is laid upon another who is engaged in the same business?

III. While petitioner recognizes that it has no vested right in any particular rule of law or mode of procedure, petitioner contends it is entitled to the same treatment as all who are similarly situated. This case does not present a situation of the state courts not following their prior decisions as occurred in *Fidelity & Columbia Trust Company* v. *City of Louisville*, 245 U.S. 54, 59-60, 62 L. ed. 145, 149, 38 Sup. Ct. Rep. 40 and *Backus* v. *Fort St. Union Depot Co.*, 169 U.S. 557, 569, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445; nor does this case present a situation of the state court subsequently changing the law after the case has been adjudicated as occurred in *Milwaukee E. R. & L. Co.* v. *Wisconsin*, 252 U.S. 100, 105; 64 L. ed. 476, 480, 40 Sup. Ct. Rep. 306. Here the contradictory results emanated from the same court *at the same time*. Obviously one decision cannot be considered as overruling the other.

IV. In the instant case, as soon as petitioner learned of the discriminatory ruling, and while the Illinois Supreme Court had jurisdiction of the cause, petitioner filed its verified motion (Appendix E, *infra* p. 34a) with the Illinois Supreme Court (The Illinois Appellate Court (Second District) having lost jurisdiction over the cause by lapse of time—See Chap. 110 Ill. Rev. Stat. 1959 sec. 74 and sec. 201.14). Petitioner attached to its verified motion certified copies of the contradictory and discriminating opinions and raised as grounds for that motion the fact that petitioner had been deprived of equal protection of the law and due process of law in violation of its rights under the Fourteenth Amendment of the United States Constitution. (Appendix E, *infra* p. 36a). Relief from the discriminatory action of the Appellate Court was re-

fused. Petitioner submits that even if the discriminatory action of the Appellate Court is viewed as having been taken in good faith, the refusal of the Illinois Supreme Court to grant relief when the cause was still before it (Chap. 77, Ill. Rev. Stat. 1959, sec. 83, see note, *supra* p. 8) can hardly be considered to be anything but intentional and invidious. The right to equal protection of the law is a right which petitioner may demand. *Hill* v. *Texas*, 316 U.S. 400, 406, 86 L. ed. 1559, 1563, 62 Sup. Ct. Rep. 1159. While it recognized that the discrimination involved here is of an unusual character, it is this type of discrimination which demands careful consideration. *Morey* v. *Doud*, 354 U.S. 457, 464, 1 L. ed. 2d 1485, 1490, 1491, 77 Sup. Ct. Rep. 1344; *Jones* v. *Securities and Exch. Com.*, 298 U.S. 1, 24, 80 L. ed. 1015, 1025, 56 Sup. Ct. Rep. 654; *Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 37, 38, 72 L. ed. 770, 774, 48 Sup. Ct. Rep. 423. In the instant case the state courts have deprived petitioner of the equal protection of the law—the Illinois Appellate Court by the discriminatory action it took, whatever its motives, and the Illinois Supreme Court by ignoring the plea of petitioner to protect its constitutional rights when that Court had jurisdiction to afford relief and refused to grant petitioner a review. The statement of Mr. Justice Clark, speaking for the majority of the Court, in the recent case of *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L. ed. 45, 52, 81 Sup. Ct. Rep. ....., appear especially in point:

> "But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

V. Petitioner also submits that because the facts of the instant case are identical in all material respects with the facts in the case of *Farmers Automobile Insurance Association* v. *Janusick* (Appendix B; *infra* pp. 21a-29a), there does not appear to be any justification for the discriminatory action of the Illinois Appellate Court. The action of the Court in granting relief to one as a matter of right and denying it to another who is identically situated does such great violence to all traditional notions of fairness and equality under the law that such action deprives petitioner of due process of law. *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 98 L. ed. 884, 886, 74 Sup. Ct. 693.

Petitioner respectfully prays that this Court exercise its discretion in favor of granting the writ particularly for the following reasons: Here the discrimination by the state judiciary between two persons who are identically situated creates the very situation which the Fourteenth Amendment was designed to prevent. The action taken in this instance is contrary to the prior applicable decisions of this Court. To sanction such an encroachment on the constitutional guarantee of equal protection is, in effect, tantamount to acquiescing in the exercise by the state courts of arbitrary power to determine who shall have a right of access to their courts. If the state judiciary has succeeded in discriminating between which insurer has a right of action today, it may likewise attempt to discriminate between which individual citizen may appear before its courts tomorrow. And if the highest court of a state may ignore the enforcement of the guarantees of the Fourteenth Amendment when these guarantees have been abridged on the ground that a review of the matter is purely discretionary, then the enforcement of those rights become a matter of whim with the State. While the pres-

ent cause is important to petitioner, it is submitted that the questions presented in this case are of greater importance to the citizenry in general.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A.

Opinion of Illinois Appellate Court (2nd Dist.) in State Farm v. Morris

UNITED STATES OF AMERICA

State of Illinois
Appellate Court
Second District—ss:

At a term of the Appellate Court, begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and sixty-one, within and for the Second District of Illinois:

SECOND DIVISION

Present—Honorable DeWitt S. Crow, Presiding Justice
Honorable Clarence E. Wright, Justice
Honorable John F. Spivey, Justice
Paul V. Wander, Clerk
Ray Eutsey, Sheriff

Be It Remembered, that afterwards, to-wit: On April 4, 1961 the same being one of the days of the term of Court aforesaid, the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

(Appendix)

Gen. No. 11448 Agenda 16

In The

APPELLATE COURT OF ILLINOIS

Second District — Second Division

February Term, A.D. 1961

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff-Appellant,
vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a Minor; VALERY STRATTON, a Minor; SAMUEL E. STRATTON; LORAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,
Defendants-Appellees.

Appeal from the Circuit Court of DeKalb County.

CROW, P. J.—

This is a complaint for declaratory judgment by the plaintiff-appellant State Farm Mutual Automobile Insurance Company against the defendants-appellees W. Terrill Morris, Juanita D. Morris, John H. Swanson, Nancy Paulson, a minor, Valery Stratton, a minor, Samuel E. Stratton, Lorain Stratton, Earl B. Paulson, Georgia Paulson, and Public Service Company. So far as material now, the complaint alleges the plaintiff issued to W. Terrill Morris its automobile liability insurance policies on his Plymouth and Chevrolet automobiles and its comprehensive and deductible collision insurance policy on his Chevrolet, copies thereof being attached as exhibits A, B, and C; the policies were in force August 22, 1959; Juanita Morris is a daughter of W. Terrill Morris and a

member of his household; on August 22, 1959 Juanita Morris while driving a Ford Thunderbird automobile owned by John H. Swanson collided with a light pole in Sandwich; Nancy Paulson, a minor, was a passenger in the auto driven by Juanita Morris; Nancy Paulson allegedly sustained injuries, and the Thunderbird was damaged; the light pole owned by Public Service Company was broken and toppled over, carrying with it and breaking electric wires; the wires struck Samuel E. Stratton and Valery Stratton, a minor, allegedly causing injuries; all of the defendants except W. Terrill Morris and Juanita D. Morris claim to have causes of action against Juanita D. Morris for injuries, or for benefits under Coverage C of the two liability policies, or for loss of services of their respective daughters, the minor defendants, or for property damages, or for benefits under Coverage G-50 of the comprehensive and deductible collision policy; the Defendants W. Terrill Morris, Juanita D. Morris, and John H. Swanson claim the plaintiff owes the duty to indemnify and defend them under "Insuring Agreement II—Non-owned automobiles" of the policies against any cause of action brought against them; the plaintiff denies it has a duty to defend, indemnify, or pay anyone except to extend Coverage C (Division 1) of the liability policies to Juanita D. Morris; and the Ford Thunderbird was an automobile furnished for the regular use of Juanita D. Morris by John H. Swanson. The complaint prays that the Court determine the rights and liabilities of the parties under the policies; and enter a declaratory judgment that no obligations are owed by the plaintiff to indemnify or defend the defendants W. Terrill Morris, Juanita D. Morris, or John H. Swanson, that no benefits are payable to any defendants other than medical bills of Juanita Morris un-

der Coverage C (Division 1) of the liability policies, and that the coverages of the policies do not apply to this collision except Coverage C (Division 1) of the liability policies.

The policies provide:

> "INSURING AGREEMENT II—NON-OWNED AUTOMOBILES"
>
> "Such insurance as is afforded by this policy under coverages A, B, Division 2 of C and M, D, D-50, F, G, and H with respect to the automobile applies to the use of a non-owned automobile by the named insured or a relative, and any other person—legally responsible for the use by the named insured or relative of an automobile not owned or hired by such other person or organization.
>
> Insuring Agreement II does not apply:
> (1) to a non-owned automobile * * *, (b) * * * furnished to the named insured or a relative for regular use, * * *"

All of the defendants filed answers, admitting or denying various allegations of the complaint, and, in substance, praying that the Court determine the rights and liabilities of the parties under the policies, and enter a declaratory judgment that the plaintiff is obligated to indemnify and defend W. Terrill Morris, Juanita D. Morris, and John H. Swanson, to pay benefits to the named defendants, and that the coverages of the policies are applicable to the collision.

The plaintiff filed a reply to the answers.

The plaintiff then filed a motion for summary judgment, to which were attached an affidavit of George H. Mitchell, an employee of the plaintiff, who had taken a statement from John H. Swanson; a copy of the statement of John H. Swanson; an affidavit of Merle L. Coop-

er, an employee of the plaintiff, who had taken statements from Dortha M. Morris (mother of Juanita D. Morris), W. Terrill Morris, and Juanita D. Morris; copies of the statements of Dortha M. Morris, W. Terrill Morris, and Juanita D. Morris; an affidavit of Gerald F. McNichols, an employee of an investigation firm engaged by the plaintiff, who interviewed Samuel E. Stratton, Mrs. Earl D. Paulson, Juanita D. Morris, Mrs. Hildred Johnson, and Rev. Chester Wright; an affidavit of Claude W. Youker, the court reporter who was with Mr. McNichols; and parts of the statements of Samuel E. Stratton, Mrs. Earl D. Paulson, Juanita D. Morris, Mrs. Hildred Johnson, and Rev. Chester Wright so taken by Mr. McNichols and Mr. Youker.

In opposition to the plaintiff's motion for summary judgment the defendants filed counter affidavits of John H. Swanson, Juanita D. (Morris) Swanson, W. Terrill Morris, and Mrs. Hildred Johnson.

Certain defendants also filed a motion to strike certain exhibits attached to the plaintiff's motion for summary judgment.

The Court denied the defendants' motion to strike certain exhibits to the plaintiff's motion for summary judgment, found that there was a question of fact, and denied the plaintiff's motion for summary judgment.

The defendants except Public Service Company then filed motions to strike the complaint and dismiss the action for these reasons:

1. A declaratory judgment may not be used as a substitute for garnishment.
2. The plaintiff, State Farm Mutual Automobile Insurance Company, has an adequate remedy in a

garnishment proceeding and can, in a garnishment proceeding, present any so-called policy defenses available to it.

3. The declaratory judgment provision of the Illinois Civil Practice Act, Section 57.1, which was formerly the Declaratory Judgment Act of 1945, is designed to supply deficiencies in legal procedure which existed before enactment of that Statute in 1945, and that an action for declaratory judgment is not intended as a substitute for ample remedies in—use before its adoption."

The Court granted the defendants' motions to strike and dismiss, dismissed the cause with prejudice, and entered a final judgment against the plaintiff and for the defendants. The plaintiff did not request leave to amend the complaint in any respect, and did not object to the defendants' filing of their motions to strike etc. or the procedure by which the matter was presented to and considered by the Court.

The plaintiff thereafter filed a motion for a stay order against certain defendants asking to have stayed further proceedings in certain allegedly pending cases in the same Court, *Valerie Stratton et al.* v. *Juanita Morris et al.*, No. 59-426, *Nancy Paulson et al.* v. *Juanita D. Morris*, No. 60-122; and *John H. Swanson* v. *Juanita D. Morris Swanson*, No. 60-121, pending this present case in the Appellate Court. The court denied the plaintiff's motion.

The plaintiff appeals from the order granting the defendants' motion to strike the complaint and dismiss the action and dismissing the cause, and from the order denying the plaintiff's motion for summary judgment.

It is the plaintiff's theory that it has no other adequate remedy to determine whether there is coverage under

the policies and whether it has a duty to defend the pending tort actions, and that it was error to dismiss this cause. It is also the plaintiff's theory that by virtue of the pleadings, admissions, affidavits, and counter-affidavits there is no genuine issue of material fact, and, therefore, it was mandatory for the court to grant the plaintiff's motion for summary judgment.

It is the defendants' theory that the plaintiff has a plain, adequate, and complete remedy available to it in a garnishment proceeding; the plaintiff may not arbitrarily substitute a declaratory judgment action for garnishment; and the trial court, in the exercise of a sound judicial discretion, correctly dismissed this action. It is also the defendants' theory that the pleadings, affidavits, counter-affidavits, and admissible exhibits do make out a genuine issue of material fact, namely, the intent of John H. Swanson, and the trial court properly denied the plaintiff's motion for summary judgment.

Both the plaintiff and defendants have in their briefs here made some allusions to alleged matters which are not referred to in the abstracts. We have ignored all such allusions.

The basic question on the merits presented by the complaint for declaratory judgment is this: Juanita D. Morris is a "relative" of the "named insured" W. Terrill Morris. The Ford Thunderbird owned by John H. Swanson and which Juanita D. Morris was driving on August 22, 1959 was a "non-owned automobile." The insurance afforded by the policies applies generally to the use of a non-owned automobile by Juanita D. Morris, but such insurance does not apply "to a non-owned automobile * * * furnished to * * * a relative for regular use * * *." Hence, was the

(Appendix)

Ford Thunderbird, owned by John H. Swanson, furnished to Juanita D. Morris, its driver, for regular use on August 22, 1959?

Section 57-1, declaratory judgments, of the Civil Practice Act, Ch. 110 Ill. Rev. Stats. 1959, par. 57.1, provides, so far as now material:

> "(1) No action or proceeding in any court of record is open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby. The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction * * * of any * * * contract or other written instrument, and a declaration of the rights of the parties interested. The foregoing enumeration does not exclude other cases of actual controversy. The court shall refuse to enter a declaratory judgment, decree or order, if it appears that the judgment, decree or order, would not terminate the controversy or some part thereof, giving rise to the proceeding."

This section, originally enacted in 1945, is essentially the form of declaratory judgment statute in force in Michigan (Mich. Comp. Laws 1929, Sec. 13903) with adaptations taken from English Order XXV, Rule 5, and the Uniform Declaratory Judgments Act (9 Uniform Laws Annotated). A declaratory judgment is unknown to the common law, is a creature of the statute, the act is to be liberally construed, but its provisions are to be strictly complied with and the prescribed rules of procedure followed: *Jones* v. *Hodges*, (1954) 2 Ill. App. (2) 509. The declaratory judgment procedure is strictly remedial. The section does not create substantive rights or duties, but

merely affords a new, additional and cumulative procedural method for their judicial determination. The declaratory judgment procedure is not a substitute for ample remedies in use before its adoption. It does not replace but merely adds to existing remedies a form of judgment to declare the rights of the parties. The remedy of declaratory relief is not exclusive, but merely cumulative and alternative. The existence of other remedies does not necessarily preclude judgment for declaratory relief, even though such other remedies may be equally effective, but the existence of another adequate remedy has an important bearing upon the question of the exercise by the court of declaratory relief to the parties, and it has been held that the existence of another adequate remedy is a bar to declaratory action and the complaint or petition therefor should under those circumstances be dismissed: *Goodyear Tire etc. Co.* v. *Tierney et al.* (1952) 411 Ill. 421; *Coven Dist. Co.* v. *City of Chicago et al.* (1952) 346 Ill. App. 448. The remedy is not designed to supplant existing remedies, nor afford a new choice of tribunals. It supplies a new form of relief where needed. It is restricted to questions that are within the province of a Court to determine, and if the case is not a case on which the Court could consider the possibilities of granting a declaration of rights the complaint therefor should, on the defendant's motion, be dismissed: *Saline Branch Drainage District et al.* v. *Urbana-Champaign Sanitary District et al.* (1948) 399 Ill. 189. If the question of whether the plaintiff will suffer any infringement of its rights is speculative,—if the interests of the plaintiff will be adversely affected only in the event some future possibility occurs or does not occur,—the action for declaratory judgment should be dismissed: *Fairbanks, Morse & Co. et al.*

v. *City Of Freeport* (1955) 5 Ill. (2) 85. The requirement that the court shall refuse entry of declaratory judgment unless entry thereof will result in termination of the controversy, or some part thereof giving rise to the proceeding, is intended to emphasize the fact that the declaratory judgment procedure is not intended to permit litigation of moot or hypothetical cases, or to enable parties to secure advisory opinions or legal advice from the court with respect to anticipated future difficulties. It is not intended by that phrase to permit piecemeal litigation. There is little danger of such a result for the court is vested by the statute with discretion to decline to award declaratory relief in any case. In appropriate cases the desirability of avoiding piecemeal litigation will serve as a proper and sound basis upon which to exercise that discretion. The granting or denying of declaratory relief even when the controversy or some part thereof will be settled thereby is discretionary with the court. It is provided in the second sentence of subsection (1) that the court "*may*, in cases of actual controversy, make binding declarations of rights." The statute, by its terms, is permissive: *Kitt et al.* v. *City of Chicago et al.*, (1953) 415 Ill. 246. The granting of declaratory relief is clearly within the discretion of the trial court, and dismissal of the action on the defendant's motion is an appropriate judicial method of declining to grant declaratory relief and is within the Court's discretion to do: *Wolf et al.* v. *Solem et al.* (1960) 26 Ill. App. (2) 262. Even though the statute be broad enough to authorize the entry of a declaratory judgment, the Courts have a discretion as to whether they will enter a declaratory judgment: *Goodyear Tire etc. Co.* v. *Tierney et al.* (1952) 411 Ill. 421. The discretion is not one to entertain the action but to enter

or decline to enter the judgment or decree. See: Historical And Practice Notes, Ch. 110 Smith-Hurd Ill. Ann. Stats., par. 57.1.

In *Hurley et al.* v. *Finley et al.* (1955) 6 Ill. App. (2) 23 the plaintiffs filed a complaint for alleged personal injuries resulting from an automobile collision. The defendants were served, but no answer filed. The insurance company which had issued an automobile insurance policy to one of the defendants filed a petition to intervene, to obtain a declaratory judgment as to its rights and obligations under the policy, and to enjoin prosecution of the suit until the declaratory judgment was obtained, alleging fraud by the defendants in regard to the policy. On the plaintiffs' motion the court vacated an order allowing the intervention, and the Appellate Court affirmed. The Court said, p. 29:

> "• • • If matters alleged in the intervening petition are true (which we assume to be true for purposes of this appeal), then intervenor has a remedy afforded to it, as a matter of law. Its defenses may be raised in any subsequent proceeding where the plaintiff with a judgment would seek to collect the proceeds of the policy. There is no compelling reason confronting this court to force extension of the Rules relating to intervention or jurisdiction. • • •"

In *Wolf et al.* v. *Solem et al.* (1960) 26 Ill. App. (2) 262, the Solems had claims against Wolf for damages arising out of an automobile collision. The Wolfs' automobile insurance company made a settlement with the Solems and obtained purported releases. The Solems later sued Marcella Wolf for their damages. She moved to dismiss, which was denied. Before she was required to answer she and her husband and their insurance company filed a complaint for declaratory judgment against the Solems

asking a declaration that the Wolfs were not obligated to the Solems and a stay of the Solems' suit pending the declaratory judgment suit. The Solems moved to dismiss the complaint for declaratory judgment, which was sustained, the complaint dismissed, and a final judgment entered for the defendants therein. This Appellate Court affirmed. The Court said, p. 267;

> "The complaint for declaratory relief and the affidavits on file in the instant case show that there was another action pending in the same court between substantially the same parties and involving substantially the same or similar issues. That action which had already accrued when the complaint was filed, afforded the parties an adequate remedy at law for adjudication of their rights and liabilities, including the validity or invalidity of the releases. No material or genuine disputed question of fact with reference to the pendency of the other action was raised. In the light of the decisions cited above, dismissal of this action on defendants' motion was an appropriate judicial method of declining to grant declaratory relief, and was well within the trial court's discretion. * * *"

In *Valente* v. *Maida et al.* (1960) 24 Ill. App. (2) 144, Valente owned an automobile and had insurance thereon. Maida was driving it, with Valente's permission, and Valente was a passenger. There was a collision and Valente was injured. Valente sued Maida. A default judgment was entered against Maida. Thereafter Valente's insurance company moved in that injuries suit to vacate the default, verdict, and judgment, and the Court stayed all proceedings on the judgment until disposition of a complaint for declaratory judgment in a separate suit filed by the insurer. The plaintiff Valente appealed from that interlocutory stay order. Meanwhile, and before the default had

been entered in that injuries suit the Valente insurance company had filed a separate declaratory judgment suit against Valente and Maida and thereafter a motion for temporary injunction and the Court in that declaratory judgment case entered an order restraining Valente from further action in the injuries suit pending a final judgment in the declaratory judgment suit. Valente appealed from that interlocutory order also. The Appellate Court reversed both interlocutory stay orders. The Valente insurance company had alleged in its complaint for declaratory judgment a failure by Valente to forward to it the notice, demand or summons, pursuant to the policy, and failure to cooperate with it, and that a genuine controversy existed as to whether it was required to afford Maida a defense in Valente's injuries suit and to pay any judgment which might be entered. The Appellate Court said, p. 151-2:

> "A declaratory judgment action may not be used as a substitute for garnishment. The insurer cannot suffer any loss until there has been a judicial determination in a garnishment or other proceeding against it. It has an adequate remedy in that proceeding and can present any defenses available to it under its policy. * * *"

Where a party injured in an automobile collision has obtained a judgment in an Illinois State Court against the defendant and his employee, which employee was driving his own car, and a garnishment against the defendant's automobile liability insurer is in preparation, a declaratory judgment suit brought by the insurer in the Federal Court in Illinois to determine whether its policy covered the matter should be dismissed,—the Court holding that an Illinois garnishment proceeding would afford opportunity to determine the exact question, the grant-

ing of relief under the declaratory judgment act rests in the sound discretion of the Court, and under the facts the Court exercised a sound judicial discretion in dismissing the complaint: *American Automobile Ins. Co.* v. *Freundt et al.* (1939) 103 F. (2) 613, C.C.A. 7th. In *State Farm Mutual Ins. Co.* v. *Wise* (1936) 277 Mich. 643 the Supreme Court of Michigan reversed a judgment for a plaintiff insurer in a declaratory judgment suit by it against its insured and certain injured claimants who had sued its insured in a currently pending injuries suit, the insurer claiming the car was being operated in a race and the accident was not covered by the policy,—the Court saying that there was no threatened invasion of the plaintiff's rights, no emergency, no ambiguity in the policy, and whatever defense the insurer may have under the policy may be raised after a judgment (if any) if obtained against its insured in the injuries suit. In *Wolverine Mutual Motor Ins. Co.* v. *Clark* (1936) 277 Mich. 633 the Supreme Court of Michigan again reversed a judgment for a plaintiff insurer in a declaratory judgment suit against its insured and an injured claimant who intended to but had not yet sued its insured in an injuries suit, the insurer claiming the car was driven by or under control of its insured's son and was not covered by the policy,—the Court observing that the insurer's liability to pay cannot accrue until the claimant has a judgment against its insured, the insurer's claimed defense may be made either in an action by the insured on the policy or in a garnishment proceeding by the claimant after judgment as completely as in the declaratory judgment suit, the insurer has another adequate remedy, there is no necessity for declaratory judgment, no certainly final judgment could be rendered in the declaratory judgment case, the

most the Court could do would be to enter a prophetic judgment, which would necessarily be contingent because the insurer's liability situation could be changed by estoppel arising from future acts, and the judgment in the declaratory judgment suit might be affected by future events.

Under the plaintiff insurer's policies it agrees:

"*Insuring Agreement I—the automobile—Coverages A and B—(A) Bodily Injury Liability and (B) Property Damage Liability.* (1) To pay all damages which the insured shall become legally obligated to pay because of (A) bodily injury sustained by other persons, and (B) injury to or destruction of property of others, caused by accident arising out of the ownership, maintenance or use, * * * of the automobile. * * * (2) As respects the insurance afforded under coverages A and B and in addition to the applicable limits of liability: (a) to defend any suit against the insured alleging such bodily injury or destruction and seeking damages on account thereof, * * * Coverage C—Medical Payments. To pay reasonable expenses incurred within one year from the date of accident for necessary medical, * * * services * * * Division 2. To or for any other person who sustains bodily injury, caused by accident, while occupying or through being struck by the automobile, * * *". Those coverages,—A, B, and Division 2 of C, plus Coverage M—Major medical Payments, Coverage D—Comprehensive, Coverage D-50—Comprehensive ($50 deductible), Coverage F—Eighty Per Cent Collision, Coverage G—Deductible Collision, and Coverage H—Emergency Road Service, are the types of insurance applicable under the policies to the use of a non-owned automobile, if any insurance is applicable. And

in the "policy conditions" the policies provide • • •" 2. Action against company. No action shall lie against the company: (a) unless as a condition precedent thereto there shall have been full compliance with all terms of this policy; (b) under coverages A and B until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. Any person • • • having secured such judgment or agreement, shall be entitled to recover under this policy to the extent of the insurance afforded. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability."

The principal things the plaintiff asks, essentially, are a declaratory judgment that it has no obligation (1) to pay any damages which Juanita D. Morris may become legally obligated to pay (or indemnify her) because of bodily injuries sustained by others or injury to or destruction of property of others under Coverages A and B, or (2) to defend any suit against her alleging such injury or destruction, or (3) to pay any of the claimants any medical etc. expenses or other benefits under Coverages C (Division 2), M, D, D-50, F, G, or H, which are not necessarily conditioned on the liability of Juanita D. Morris,—because, as the plaintiff alleges, the Ford Thunderbird, owned by John H. Swanson, was a non-owned automobile furnished to Juanita D. Morris, its driver, for regular use on August 22, 1959.

As to the first matter, which is, by far, the larger, primary matter here concerned,—whether the plaintiff has

any obligation to pay any damages which Juanita D. Morris may become legally obligated to pay (or indemnify her) because of bodily injuries to or injury to or destruction of property of others under Coverages A and B, it seems clear to us that the plaintiff has an entirely adequate remedy in any future garnishment proceeding which may be brought against it if any claimant obtains a judgment against Juanita D. Morris and she does not pay such or in any future suit by her against it if she does pay such, in which proceeding or suit it can present fully its alleged policy defense. Under the policy no action lies against it unless there has been full compliance with the policy, and, as to bodily injuries to or injury to or destruction of property of others, not until a judgment against Juanita D. Morris (or an agreement by it, her, and the claimant). Whether it will suffer any infringement of its rights is, as of now, speculative,—its interests will under no circumstances be adversely affected except in the event of a future possible judgment or judgments against Juanita D. Morris, which event may or may not occur It is not within the province of the Court in this declaratory judgment suit to determine a speculative question. It could not enter a prophetic judgment contingent in character which would be subject to being affected by future uncertain events. *Rodenkirk* v. *State Farm Mut. Auto. Ins. Co.* (1945) 325 Ill. App. 421 is an instance where an alleged policy defense rather similar to that in the case at bar was presented in a garnishment proceeding evidently involving the same insurer as here and that case on its particular facts was determined favorably to the garnishee insurer.

As to the third matter, which is the only other insurance coverage matter, as such, here concerned,—whether the plaintiff has any obligation to pay any of the claimants

any medical etc. expenses or other benefits under Coverages C (Division 2), M, D, D-50, F, G, or H, which are not necessarily conditioned on the liability of Juanita D. Morris, it seems equally clear to us that the plaintiff has an entirely adequate remedy in any future suit which may be brought against it by any claimant, in which suit it can present fully its alleged policy defense. Again, under the policy no action lies against it unless there has been full compliance with the policy. *Harter et al.* v. *County Mutual Ins. Co.* (1959) 20 Ill. App. (2) 413, where the executors of an insured and his deceased wife sued their automobile insurer for certain alleged accidental death benefits, is an example where an alleged policy defense somewhat similar to that in the case at bar was presented in the law suit brought against the insurer on its policy and a judgment for the plaintiffs was reversed and remanded for a new trial.

As to the second matter,—whether the plaintiff has any obligation to defend any suit against Juanita D. Morris alleging bodily injuries sustained by others or injury to or destruction of property of others,—this is not a separate, distinct insurance coverage, as such, like "Coverages A and B—(A) Bodily injury liability and (B) Property Damage Liability", or "Coverage C—Medical Payments. Division 2", or Coverages M, D, D-50, F, G, or H. It is simply an incidental part, in a sub-subparagraph, of "Coverages A and B—(A) Bodily Injury Liability and (B) Property Damage Liability". In the nature of things it is a smaller, subordinate, incidental, secondary matter, —not a larger, primary matter. To present it here in this declaratory judgment case partakes of asking the Court for an advisory opinion or legal advice or business judgment policy advice as to what the plaintiff may, can,

or should do, which is beyond the province of the Court to determine. If a declaratory judgment is inappropriate as to the first and larger, primary matter foregoing, as we've indicated, it is also inappropriate as to this second and smaller, subordinate, incidental, secondary matter. And if, as we've said, a declaratory judgment is inappropriate as to both the first and third matters foregoing,—the only insurance coverage matters, as such, here involved,—it would be improperly permitting piecemeal litigation on a smaller, incidental matter to say that a declaratory judgment might be entered on this second matter even if it were thought that a declaratory judgment were otherwise appropriate as to that,—a judgment which, further, would not terminate this controversy as to its larger, primary features. If this second matter poses an awkward and difficult problem and dilemma at this stage for the plaintiff insurer as to what to do, it is primarily at this point a business judgment policy problem inherent in the nature of its business and in the language of its own policy, which the Court is not required in this declaratory judgment suit to solve. There are, of course, many matters as to which the law may not at a particular stage of the proceeding have any answer.

If the existence of other entirely adequate remedies as to the larger, primary matters here concerned do not necessarily preclude a declaratory judgment, such factor at least has an important bearing upon the exercise by the Court of declaratory relief to the parties. And the desirability of avoiding piecemeal litigation is a proper and sound basis upon which the Court may exercise its discretion to decline declaratory relief even if it were thought a declaratory judgment might be otherwise appropriate as to some lesser, secondary phase of the

case. The granting or denying of a declaratory judgment was within the judicial discretion of the trial court. There was no manifest abuse of discretion in dismissing the action.

Under the circumstances it is not necessary to determine whether there was error in denying the plaintiff's motion for summary judgment.

The judgment will, accordingly, be affirmed.

Affirmed.

WRIGHT, J., and SPIVEY, J., Concur

State of Illinois
Appellate Court
Second District—ss:

I, Paul V. Wunder, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of May, in the year of our Lord one thousand nine hundred and sixty-one.

/s/ Paul V. Wunder
Clerk of the Appellate Court.

(Seal)

APPENDIX B.

Opinion of Illinois Appellate Court (2nd Dist.) in Farmers Auto. Ins. Ass'n. v. Janusick

UNITED STATES OF AMERICA

State of Illinois
Appellate Court
Second District—ss:

At a term of the Appellate Court, begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and sixty-one, within and for the Second District of Illinois:

FIRST DIVISION

Present—Honorable Samuel O. Smith, Presiding Justice
Honorable Franklin R. Dove, Justice
Honorable Dan H. McNeal, Justice
Paul V. Wunder, Clerk
Ray Eutsey, Sheriff

Be It Remembered, that afterwards, to-wit:

On April 4, 1961 the same being one of the days of the term of Court aforesaid, the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

(Appendix)

Nos. 11457 and 11469 Cons. Publish Agenda 16

In The
APPELLATE COURT OF ILLINOIS
Second District — First Division
October Term, A.D. 1960

THE FARMERS AUTOMOBILE INSURANCE ASSOCIATION, an inter-insurance exchange,
Plaintiff-Appellant,
vs.

CLETUS JANUSICK, PATRICIA McLAUGHLIN DRENNAN, KATHERINE DRENNAN, CAROL McLAUGHLIN, TERRY ANN McLAUGHLIN, a minor, SHAWN BETH McLAUGHLIN, a minor, CAROL McLAUGHLIN, Administrator of the Estate of CAROL ANNE McLAUGHLIN, Deceased,
Defendants-Appellees.

Appeal from the Circuit Court, LaSalle County.

McNeal, J.—

This is an appeal from an order denying a motion for summary judgment and allowing a motion to dismiss a complaint for declaratory judgment.

As to the salient facts, the record shows that as of September 17, 1958, the Farmers Automobile Insurance Association had issued an insurance policy to Cletus Janusick insuring him from liability incurred while operating a certain 1953 Oldsmobile or while operating any automobile acquired to replace that vehicle. The record further shows that on that date and while operating a 1952 Oldsmobile, Janusick was involved in a collision. As a result of this collision and on December 2, 1958, damage suits were filed against Janusick by Patricia

McLaughlin Drennan, Katherine Drennan, Carol McLaughlin, Terry Ann McLaughlin, a minor, Shawn Beth McLaughlin, a minor, and Carol McLaughlin, administrator of the estate of Carol Anne McLaughlin, deceased. Janusick filed an answer in these suits through his personal attorneys, and the attorneys for the Farmers Automobile Insurance Association entered their appearance under a non-waiver agreement.

On March 19, 1959, The Farmers Automobile Insurance Association filed an action seeking a declaratory judgment that its policy did not cover Janusick's operation of the 1952 Oldsmobile involved in the collision in question. Janusick and the parties who had sued him were named defendants in the action. The insurance carrier made a motion for summary judgment and supported the motion with an affidavit that the 1952 Oldsmobile was not a replacement for the 1953 Oldsmobile described in the policy. Counter affidavits were filed to the effect that Janusick had sold the 1953 Oldsmobile, that he had taken a 1950 Chevrolet in trade, that the 1950 Chevrolet was not usable and was sold as junk, and that Janusick had purchased the 1952 Oldsmobile as a replacement for the 1953 Oldsmobile. Also a motion was filed to dismiss the action for declaratory judgment on the ground that it was premature and could not properly be filed prior to the entry of judgments in the damage suits against Janusick. The circuit court denied the motion for summary judgment and allowed the motion to dismiss the complaint for a declaratory judgment. This appeal followed.

The statute pertaining to summary judgments, ch. 110, sec. 57 (3), Ill. Rev. Stat., 1959, provides that a summary judgment may be entered only if the record shows that "there is no genuine issue as to any material fact." The

record in the case at bar shows that the question as to whether the 1952 Oldsmobile was or was not a replacement for the 1953 Oldsmobile was directly at issue. Since this constituted a genuine issue as to a material fact, we believe that the circuit court was correct in denying the motion for summary judgment.

A number of recent decisions fully support the action of the circuit court in denying the motion for summary judgment. In *Halloran* v. *Belt Railway Company of Chicago*, 25 Ill. App. 2d 114, 118, the Court used the following language in reversing a summary judgment:

> "This procedure may not be used to impair the right of trial by jury. Its purpose is not to try an issue of fact, as it is only when the undisputed facts are susceptible of but a single inference does the issue become one of law. (*Inland Steel Co.* v. *Industrial Commission*, 18 Ill. 2d 70, 78 (1959). Questions which are composed of factors sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. (*Ney* v. *Yellow Cab Co.*, 2 Ill. 2d 74, 84 (1954). Defendant's right to judgment must be free from doubt. If the pleadings, discovery depositions and exhibits present a genuine issue as to any material fact, the judgment order ought not to have been entered. *Naus* v. *Joanna-Western Mills Co.*, 18 Ill. App. 2d 85, 92 (1958); *Allen* v. *Meyer*, 14 Ill. 2d 284, 292 (1958)."

In *Simaitis* v. *Thrash*, 25 Ill. App. 2d 340, 347, the Court reversed a summary judgment and used the following language:

> "Summary judgment procedure may not be used to impair the right of trial by jury. Its purpose is not to try an issue of fact but to try whether one exists between parties within the legal meaning. *Sampson Co.* v. *Mandel Bros.*, 3 Ill. App. 2d 92, 120 N.E. 2d 571. The purpose of summary judgment proceedings is

to determine whether there is any genuine triable issue of fact which must be passed upon and, if there is, the motion for summary judgment must be denied. *Gribben* v. *Interstate Motor Freight System Co.*, 18 Ill. App. 2d 96, 151 N.E. 2d 443."

See also *Ehresman* v. *The Town of Loda, et al*, 25 Ill. App. 2d 259.

As to the propriety of the circuit court's action in dismissing the complaint for a declaratory judgment, we have read the various decisions cited by the parties, including *Valente* v. *Maida*, 24 Ill. App. 2d 144, wherein the court held that once the injured third person obtains a judgment against the insured, it is not proper to restrain the third person from taking action on the judgment pending a decision on the question of insurance coverage. However, none of the Illinois decisions which have been cited covers the precise question involved in this case, i.e. whether the insurance company had a right to file its complaint for declaratory judgment during the pendency of the various suits brought by the injured third persons.

There is a wide divergence among the authorities in other jurisdictions on this point and a number of decisions have been called to our attention which lend support to both sides in the instant controversy. However, certain general rules are laid down in the authorities which seem to cover the instant situation.

For example, the following statements appear in the 1960 Supplement to Vol. 16, Am. Jur., Declaratory Judgments, sec. 35, pages 68, 70:

"• • • it may no longer be doubted that the extent of an insurer's responsibility or its immunity from liability under an insurance contract are rights which

it can petition to have determined by declaratory judgment.

"In the case of liability policies, a dispute or controversy between the insurer and its insured as to the fact or extent of liability under the policy to persons injured as a result of the operation of the insured automobile, including, in most cases, the insurer's obligation to defend the insured in actions threatened or pending for damages against him, is generally held to present an actual or justiciable controversy within a declaratory judgments act.

"* * * the better reasoned authority is that the obtaining of a judgment against the insured is not a condition precedent to the existence of an actual controversy involving the liability of the insurer."

In 26 C.J.S. 166, Declaratory Judgments, sec. 64, it is stated that an insurer may ask for a declaratory judgment to determine questions of coverage, and that: "When the injured person is asserting a claim against the insured, the insurer, in order to invoke a declaratory judgment, need not wait until the claim is reduced to judgment, or until an action or suit is started, and declaratory relief may be invoked when the injured person is threatening to file suit and the insurer denies liability under the policy, or where suit is brought against the insured and suit is threatened against the insurer."

A lengthy annotation on the subject appears in 142 ALR 8, 12, and the following statements appear therein:

"That the remedy of declaratory judgment, under Federal and state declaratory judgment actions, is a proper one for the determination of questions arising from the construction and operation of insurance policies with regard to the rights and liabilities of the parties thereunder is well settled, irrespective of whether such policies involve accident, fire, health, life, or liability or indemnity insurance.

> "• • • the better reasoned authority is that the obtaining of a judgment against the insured is not a condition precedent to the existence of an actual controversy involving the liability of the insurer."

Appleman, Insurance Law and Practice, Vol. 20, pages 68, 69, observes that a declaratory judgment action constitutes a cumulative remedy which should not be whittled away with exceptions. Declaratory judgment statutes should be liberally construed to effectuate the ends of justice. In Sec. 11352, page 84, the text states that a declaratory judgment statute should not be used as an instrument of "procedural fencing" in order to delay justice. The following statement appears in sec. 11356, page 102:

> "• • • and where persons injured in an automobile accident asserted a claim against an insured, the insurer was not required to wait until such claim was reduced to judgment before bringing a declaratory judgment action."

In Vol. 16 I.L.P. 69, Declaratory Judgments, sec. 2, it is stated that declaratory judgment statutes should be liberally construed and that the relief afforded under such statutes is an alternative or an additional remedy to facilitate the adminstration of justice.

To summarize, the foregoing authorities indicate that declaratory judgment statutes should be liberally construed; that the construction of an insurance policy is the proper subject of a declaratory judgment action; and that the insurance company may ask to have its policy construed prior to the time that a suit against the insured has been prosecuted to judgment. Declaratory judgment statutes should be used to promote and facilitate rather than delay and impede the meting out of justice.

(Appendix)

Applying these principles to the case at bar, we believe that the insurance carrier had a right to file its complaint for a declaratory judgment prior to the time that the injured third persons obtained a judgment against the insured, and that the circuit court erred in dismissing the complaint on the ground that it was premature. On the other hand, we do not believe that the pendency of such an action should unduly or unreasonably delay the prosecution of the suits filed by the injured third persons, and bearing in mind the considerable length of time which has already elapsed, we hold that the pendency of the declaratory judgment action should not delay the prosecution of said suits should the injured third parties elect to proceed at this time. On the other hand, the insurance carrier has a right to have its rights determined in the declaratory judgment action, or it may await the outcome of the suits against the insured and raise the coverage question in a garnishment action or in a direct action instituted under section 388 of the Illinois Insurance Code (Par. 1000, Ch. 73, Ill. Rev. Stat., 1959).

Following the oral argument of this cause, the attorneys for the plaintiffs in the damage suits and Janusick's personal attorneys attempted to waive a jury trial and set those suits for trial before the court. The attorneys for the insurance carrier advised that they felt that they had a right to defend Janusick without waiving any policy defenses which they might have. The attorneys for the plaintiffs in those suits then filed a motion in this Court to dismiss this appeal on the ground that the questions raised by the appeal are moot. This motion has been taken with the case. It is the holding of this Court that the question of coverage raised by the declaratory judgment action is not moot. Further, in view

of this Court's ruling that the declaratory judgment action may not be used to further delay the trial of the damage suits, it is the holding of this Court that the attorneys for the insurance carrier have the right to defend such suits without waiving the question of coverage and that that question may be resolved either in the pending declaratory judgment action or in any subsequent garnishment or direct action instituted against the insurance carrier. The motion to dismiss the appeal is accordingly denied.

The judgment of the Circuit Court of LaSalle County denying the motion for summary judgment is affirmed; the judgment of said court dismissing the complaint for a declaratory judgment is reversed; and this cause is remanded with directions to proceed in accordance with the views expressed herein.

Affirmed in part; reversed in part; and remanded with directions.

SMITH, P.J., and DOVE, J., concur.

State of Illinois
Appellate Court
Second District—ss:

I, Paul V. Wunder, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 31st day of May in the year of our Lord one thousand nine hundred and sixty-one.

/s/ Paul V. Wunder
Clerk of the Appellate Court.

(Seal)

APPENDIX C.

Judgment Order of Illinois Appellate Court (2nd Dist.) in State Farm v. Morris

UNITED STATES OF AMERICA

State of Illinois
Appellate Court
Second District—ss:

At a term of the Appellate Court, begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and sixty-one, within and for the Second District of Illinois:

SECOND DIVISION

Present—Honorable DeWitt S. Crow, Presiding Justice
Honorable Clarence E. Wright, Justice
Honorable John F. Spivey, Justice
Paul V. Wunder, Clerk
Ray Eutsey, Sheriff

Be it remembered, That, to-wit: On the 4th day of April, A.D. 1961, certain proceedings were had, and orders made and entered of record by said Court, among which is the following, viz:

(Appendix)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

11448 vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a Minor; VALERY STRATTON, a Minor; SAMUEL E. STRATTON; LORAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,
Appellees.

} Appeal from the Circuit Court of DeKalb County.

On this day came again the said parties, and the Court, having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, finds that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in said record there is no error.

Therefore it is considered by the Court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from said appellant, their costs in this behalf expended, to be taxed and that they have execution therefor.

APPENDIX D.

Order of Illinois Supreme Court Denying Petition for Leave to Appeal

UNITED STATES OF AMERICA

State of Illinois
Supreme Court—ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of May in the year of our Lord, one thousand nine hundred and sixty-one, within and for the State of Illinois.

Present: Walter V. Schaefer, Chief Justice
Justice Joseph E. Daily Justice George W. Bristow
Justice Harry B. Hershey Justice Ray I. Klingbiel
Justice Byron O. House Justice Roy J. Solfisburg, Jr.
William G. Clark, Attorney General
Robert G. Miley, Marshal
Attest: Mrs. Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 18th day of May 1961, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

(Appendix)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

No. 36514 vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a Minor; VALERY STRATTON, a Minor; SAMUEL E. STRATTON; LORAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation.
Respondents.

Petition for Leave to Appeal from Appellate Court, Second District, DeKalb County.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioner costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Mrs. Earle Benjamin Searey, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 23rd day of May, 1961.

s/ Mrs. Earle Benjamin Searey, Clerk
Supreme Court of the State of Illinois

(Seal)

APPENDIX E.

Verified Motion to Reconsider Denial of Petition for Leave to Appeal

No. 36514

In The

SUPREME COURT OF ILLINOIS

May Term, A.D. 1961

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff-Petitioner,
vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a Minor; VALERY STRATTON, a Minor; SAMUEL E. STRATTON; LORAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,
Defendants-Respondents.

Petition for Leave to Appeal from the Appellate Court of Illinois, Second District

There Heard on Appeal from the Circuit Court of Kane County

Honorable
Cassius Poust,
Judge Presiding.

MOTION TO RECONSIDER DENIAL OF PETITION FOR LEAVE TO APPEAL

Now Comes Plaintiff-Petitioner, State Farm Mutual Automobile Insurance Company, by Sears, Streit, Tyler and Dreyer, its Attorneys and moves the Court to Reconsider and Vacate Its Order denying leave to appeal in the above-entitled cause and attaches hereto its suggestion in support of this motion and a certified copy of the

(Appendix)

Opinion issued by the same Appellate Court in an identical case adopting an opposite rule than that adopted by that Court in the above-entitled cause.

/s/ Sears, Streit, Tyler & Dreyer
Attorneys for Plaintiff-Petitioner

SUGGESTIONS

1.) The above-entitled cause involves a dismissal of a complaint for a declaratory judgment brought by plaintiff to determine insurance coverage, which dismissal, and the affirmance thereof of the Illinois Appellate Court (Second District—Second Division) was based on the theory that plaintiff was required to seek its relief in defense of a garnishment action after judgment in the pending common-law actions.

2.) That appellant learned subsequent to the denial of the petition for leave to appeal by this Court on May 10, 1961 that at about the same time the Second Division of the Second District Appellate Court of Illinois affirmed the dismissal of the complaint for declaratory judgment in the above-entitled cause; the First Division of the Second District Appellate Court of Illinois reversed the dismissal of a similar complaint for declaratory judgment in a certain cause known as *Farmers Automobile Insurance Association* v. *Cletus Janusick et al*, Appellate Court Number 11469 consolidated with Number 11457, on the ground that the plaintiff-appellant had a right under the Declaratory Judgment Act (Chap. 110 Ill. Rev. Stat. 1959, section 57.1) to have its coverage questions resolved in such a proceeding. That a certified copy of the said opinion is attached hereto. That said cause is presently pending on the rehearing docket of the First Division, Illinois Appellate Court (Second District).

(Appendix)

3.) That unless this Court reconsiders its denial of Petition for Leave to Appeal in the above-entitled cause the same Appellate Court will have announced two diametrically opposed constructions of the Declaratory Judgment Act (Chap. 110, Ill. Rev. Stat., 1959, sec. 57.1) as applied to the same factual situation at the same time.

4.) That Petitioner is unable to re-present its cause to the Second District, Appellate Court in order to give that Court the opportunity to resolve its conflicting position in that the time for filing a petition for rehearing has expired.

5.) That the construction of the Declaratory Judgment Act, (Chap. 110 Ill. Rev. Stat. 1959, sec. 57.1) applied to the above entitled cause and the applying of the opposite construction to said Act by the Illinois Appellate Court Second District in a similar case at the same time has deprived this Petitioner of due process of law in violation of The Constitution of 1870, Article IX, section 2 and has deprived Petitioner of due process of law and the equal protection of law in violation of the Fourteenth Amendment of the United States Constitution, section 1, the benefits of which your Petitioner hereby invokes and claims.

6.) That this Court has jurisdiction to vacate and reconsider its denial of the petition for leave to appeal by reason of the provisions of Chapter 77, Ill. Rev. Stat., 1959, sec. 83 which provides:

> "Any such judgment, decree or order may hereafter be modified, set aside or vacated prior to the expiration of thirty days from the date of its rendition or in pursuance of a motion made within such thirty days, wherever, under the law heretofore in force, it might have been set aside or vacated prior to the expiration of the term of court at which it was rendered or

in pursuance of a motion made at that term."

/s/ Sears, Streit, Tyler & Dreyer
Attorneys for Petitioners

State of Illinois
County of Kane—ss:

Marvin D. Dunn being first duly sworn on oath deposes and says that he is an attorney associated with the law firm of Sears, Streit, Tyler and Dreyer, Attorneys for Petitioner in the above entitled cause; that he has read the above and foregoing suggestions in support of the Motion to Reconsider and Vacate the Order Denying Petition for Leave to Appeal and the matters therein set forth are true to the best of his knowledge and belief.

/s/ Marvin D. Dunn

Subscribed and sworn to before
me this 29th day of May, 1961.
/s/ Catherine Clemens
Notary Public

State of Illinois
County of Kane—ss:

Marvin D. Dunn, being first duly sworn on oath, deposes and says he served a copy of the foregoing Motion to Reconsider Denial of Petition for Leave to Appeal upon:

Thomas P. O'Malley and
Leon Weiss
Attorneys at Law
30 S. Island Avenue
Aurora, Illinois

Joseph C. Sibley Jr. and
Emmet T. Gallagher
Attorneys at Law
72 West Adams St.
Suite 1600
Chicago, Illinois

Louis Neuendorf
Attorney at Law
Sandwich State Bank Bldg.
Sandwich, Illinois

by depositing a true and correct copy of the same in the United States Mail at Aurora, Illinois, addressed as above, postage prepaid, this 29th day of May, 1961.

/s/ Marvin D. Dunn

Subscribed and sworn to before
me this 29th day of May, 1961.
/s/ Catherine Clemens
Notary Public

EXHIBIT A to *Motion To Reconsider Denial of Petition for Leave to Appeal* certified copy of Opinion of Illinois Appellate Court (Second District) of April 4, 1961 in the case of *"Farmers Automobile Insurance Association* v. *Cletus Janusick et al* (Appellate Court No. 11469)" heretofore reproduced as Appendix B *supra* pp. 21a-29a.

EXHIBIT B to *Motion to Reconsider Denial of Petition for Leave to Appeal* certified copy of Opinion of Illinois Appellate Court (Second District) of April 4, 1961 in the case of *"State Farm Mutual Automobile Insurance Company* v. *W. Terrill Morris et al"* heretofore reproduced as Appendix A *supra* pp. 1a-20a.

APPENDIX F.

Order of Illinois Supreme Court Denying Motion to Reconsider Denial of Petition for Leave to Appeal

UNITED STATES OF AMERICA

State of Illinois
Supreme Court—ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of May in the year of our Lord, one thousand nine hundred and sixty-one, within and for the State of Illinois.

Present: Walter V. Schaefer, Chief Justice
Justice Joseph E. Daily Justice George W. Bristow
Justice Harry B. Hershey Justice Ray I. Klingbiel
Justice Byron O. House Justice Roy J. Solfisburg, Jr.

William G. Clark, Attorney General
Robert G. Miley, Marshal
Attest: Mrs. Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 6th day of June, A.D. 1961, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner,
No. 36514 vs.
W. TERRILL MORRIS, et al., etc., Respondents.

Petition for Leave to Appeal from Appellate Court, Second District

(Appendix)

And now, on this day, the Court having duly considered the motion by petit. .ier for reconsideration of order denying petition for leave to appeal, and being now fully advised of and concerning the premises;

It Is Hereby Ordered that the motion by petitioner for reconsideration of order denying petition for leave to appeal be, and the same is, denied.

APPENDIX G.

Illinois Declaratory Judgment Act

Chapter 110, Ill. Rev. Stat. 1959, Section 57.1:

"(1) No action or proceeding in any court of record is open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby. The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any statute, municipal ordinance, or other governmental regulation, or of any deed, will, contract or other written instrument, and a declaration of the rights of the parties interested. The foregoing enumeration does not exclude other cases of actual controversy. The court shall refuse to enter a declaratory judgment, decree or order, if it appears that the judgment, decree or order, would not terminate the controversy or some part thereof, giving rise to the proceeding.

(2) Subject to rules, declarations of rights, as herein provided for, may be obtained by means of a pleading seeking that relief alone, or as incident to or part of a complaint, counterclaim or other pleading seeking other relief as well, and if a declaration of rights is the only relief asked, the case may be set for early hearing as in the case of a motion.

(3) If further relief based upon a declaration of right becomes necessary or proper after the declaration has been

made, application may be made by petition to any court having jurisdiction for an order directed to any party or parties whose rights have been determined by the declaration to show cause why the further relief should not be granted forthwith, upon reasonable notice prescribed by the court in its order.

(4) If a proceeding under this section involves the determination of issues of fact triable by a jury, they shall be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

(5) Unless the parties agree by stipulation as to the allowance thereof, costs in proceedings authorized by this section shall be allowed in accordance with rules. In the absence of rules the practice followed in ordinary actions at law or in equity shall be followed if applicable, and if not applicable, the costs may be taxed as to the court seems just. Laws 1933, June 23, Laws 1933, p. 784, art. 7, § 57.1, added 1955, July 19, Laws 1955, p. 2238, § 1."

SEP
JAMES R

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 306

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a minor; VALERY STRATTON, a minor; SAMUEL E. STRATTON; LORRAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,

Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court (Second District)

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS P. O'MALLEY,
LEON J. WEISS,
30 South Island Avenue,
Aurora, Illinois.

Attorneys for Respondents, Samuel E. Stratton, Jr., Lorraine Stratton, and Valeria L. Stratton, a Minor.

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Telephone: Financial 6-3[illegible]

INDEX.

PAGE

Objections to the Jurisdiction 1

Additional Statement of the Case 2

Reasons for Denying the Writ 3

Conclusion 12

Appendices:

A—Ill. Rev. Stat. 1959, Chap. 110, Sec. 201.14 ..... 1a

B—Ill. Rev. Stat. 1959, Chap. 110, Sec. 75 ..... 2a

C—Title 28, U.S.C.A., Rule 19 of the Revised Rules of the Supreme Court of the United States 5a

AUTHORITIES

Cases:

American Railway Exp. Co. v. Levee, 263 U.S. 19, 44 S. Ct. 11, 68 L. ed. 140, 143 4

American Surety Co. v. Baldwin, 287 U.S. 156, 53 S. Ct. 98, 77 L. ed. 231, 236 ..... 4, 8

Backus Jr. & Son v. Fort Street Union Depot Co., 169 U.S. 557, 18 S. Ct. 445, 42 L. ed. 853, 859, 860 ..... 4, 10, 11

Durley v. Mayo, 351 U.S. 277, 281, 76 S. Ct. 806, 100 L. ed. 1178, 1183 8

Ennis Waterworks v. Ennis, 233 U.S. 652, 658, 34 S. Ct. 767, 58 L. ed. 1139, 1141 ..... 4, 7

Farmers Automobile Insurance Ass'n. v. Janusick, 30 Ill. App. 2d 352 ..... 2, 3

Flournoy v. Wiener, 321 U.S. 253, 64 S. Ct. 548, 88 L. ed. 708 8

Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520 10

Illinois Central R. Co. v. Michigan Central R. Co., 18 Ill. App. 2d 462, 485 3

Layne and Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 393, 43 S. Ct. 422, 67 L. ed. 712, 714 10
Lynch v. New York, 293 U. S. 52, 55 S. Ct. 16, 79 L. ed. 191 8
McCann v. Continental Casualty Co., 6 Ill. App. 2d 527, 534, 535 3
Michigan-Wisconsin P. L. Co. v. Calvert, 347 U. S. 157, 74 S. Ct. 396, 98 L. ed. 583, 588 4
Milwaukee E. R. & L. Co. v. Wisconsin, 252 U. S. 100, 40 S. Ct. 306, 64 L. ed. 476 ..... 6, 10
Muhlker v. New York, 197 U.S. 544, 25 S. Ct. 522, 49 L. ed. 872 10
Parker v. County of Los Angeles, 338 U. S. 327, 70 S. Ct. 396, 94 L. ed 144 6
Radio Station WOW, Inc. v. Johnson, 326 U. S. 120, 65 S. Ct. 1475, 89 L. ed. 2092 ..... 4, 8
Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. ed. 897, 903 ..... 6, 9
Snowden v. Hughes, 321 U. S. 1, 64 S. Ct. 397, 88 L. ed. 497 ..... 3, 11
State Farm Mutual Automobile Insurance Company v. Morris, 29 Ill. App. 2d 451 2
Stein v. New York, 346 U. S. 156, 73 S. Ct. 1077, 97 L. ed. 1522 10
Stembridge v. Georgia, 343 U. S. 541, 547, 72 S. Ct. 834, 96 L. ed. 1130 8
United States Fidelity and Guaranty Co. v. Oklahoma, 250 U. S. 111, 39 S. Ct. 399, 63 L. ed. 876 ..... 4, 7
Walters v. Walters, 409 Ill. 298, 305 3

Statutes:

Title 28, U.S.C.A., Sec. 1257 1
Ill. Rev. Stat. 1959, Chap. 110, Sec. 57.1 5
Ill. Rev. Stat. 1959, Chap. 110, Sec. 201.14 ..... 1a
Ill. Rev. Stat. 1959, Chap. 110, Sec. 75 ..... 2a
Title 28, U.S.C.A., Rule 19 of the Revised Rules of the Supreme Court of the United States 5a

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 306

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a minor; VALERY STRATTON, a minor; SAMUEL E. STRATTON; LORRAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,

Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court (Second District)

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OBJECTIONS TO THE JURISDICTION.

Respondents respectfully object that 28 U.S.C.A., Sec. 1257, vests no jurisdiction in this Court to entertain the instant cause for these reasons:

(1) The complete record in *Farmers Automobile Insurance Ass'n.* v. *Janusick*, 30 Ill. App. 2d 352, is not before this Court. Inasmuch as the petition fails to state the course of the *Janusick* case subsequent to denial of rehearing therein, the record as filed in this Court involves no federal question;

(2) It is not competent for this Court to review the Illinois Supreme Court's order denying motion to reconsider denial of petition for leave to appeal (Petitioner's Appendix F, pp. 39a-40a);

(3) Petitioner's constitutional foundation (Petitioner's Appendix E, pp. 34a-38a) was procedurally tardy and is a mere assertion of right without real and substantial controversy.

ADDITIONAL STATEMENT OF THE CASE.

Petitioner's statement of the case tends to mislead in the following respect:

The cause here sought to be reviewed was decided by the Illinois Appellate Court (Second District), *Second Division*, by Justices DeWitt S. Crow, Clarence E. Wright and John F. Spivey (Petitioner's Appendix A, pp. 1a-20a, reported as 29 Ill. App. 2d 451).

Farmers Automobile Insurance Ass'n. v. *Janusick*, 30 Ill. App. 2d 352, was decided by the Illinois Appellate Court (Second District), *First Division*, by Justices Dan H. McNeal, Franklin R. Dove and Samuel O. Smith (Petitioner's Appendix B, pp. 21a-29a). Both divisions of the Appellate Court (Second District) sit at Ottawa, Illinois.

REASONS FOR DENYING THE WRIT.

The petition herein should be denied for the following jurisdictional and substantive reasons:

I.

THE RECORD HEREIN DISCLOSES NO FEDERAL QUESTION AND, ACCORDINGLY, THIS COURT DERIVES NO JURISDICTION BY VIRTUE OF 28 U.S.C.A., SEC. 1257 (3).

The instant petition amorphously charges two Illinois courts with constitutional error. It accuses the Illinois Supreme Court of having denied equal protection of the law and the Second Division of the Illinois Appellate Court (Second District) of having denied due process and equal protection.

The nub of the petition, however, is that a decision of the *First Division* of the Illinois Appellate Court (Second District) in *Farmers Automobile Insurance Ass'n.* v. *Janusick*, 30 Ill. App. 2d 352 (Petitioner's Appendix B, pp. 21a-29a), the current status of which Petitioner does not disclose, is divergent from the decision of this cause by the *Second Division* of that court (Petitioner's Appendix A, pp. 1a-20a, reported as 29 Ill. App. 2d 451), the result of which decision has been approved by the Illinois Supreme Court's refusal to review (Petitioner's Appendix D, pp. 32a-33a). *Walters* v. *Walters*, 409 Ill. 298, 305; *Illinois Central R. Co.* v. *Michigan Central R. Co.*, 18 Ill. App. 2d 462, 485; *McCann* v. *Continental Casualty Co.*, 6 Ill. App. 2d 527, 534, 535.

Respondents submit that, considering the entire record as filed, this divergence of decisions does not constitute a federal question (*Snowden* v. *Hughes*, 321 U.S. 1, 64

S. Ct. 397, 88 L. ed. 497; *Backus Jr. & Son* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 18 S. Ct. 445, 42 L. ed. 853, 859, 860); secondly, the petition's charge of grievance by the Illinois Supreme Court is no part of the Second Division's judgment here sought to be reviewed and, thus, is not proper matter for this Court's consideration (*Michigan-Wisconsin P. L. Co.* v. *Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. ed. 583, 588); thirdly, Petitioner's attempt to raise a so-called federal question is a mere naked assertion of constitutional claim without real and substantial controversy (*United States Fidelity and Guaranty Co.* v. *Oklahoma*, 250 U.S. 111, 39 S. Ct. 399, 63 L. ed. 876; *Ennis Waterworks* v. *Ennis*, 233 U.S. 652, 658, 34 S. Ct. 767, 58 L. ed. 1139, 1141), which assertion procedurally came too late in the litigation. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. ed. 2092; *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. ed. 231, 236.

I. In view of the Illinois Supreme Court's refusal to review the Second Division's decision herein (Petitioner's Appendices A, pp. 1a-20a, D, pp. 32a-33a), the Second Division becomes, for purposes of this Court's jurisdiction, the highest court of a state in which a decision could be had (*Michigan-Wisconsin P. L. Co.* v. *Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. ed. 583, 588; *American Railway Exp. Co.* v. *Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L. ed. 140, 143), and its judgment is the judgment sought to be reviewed. The record reveals that at no time was any federal question either presented to, or passed upon, by the Second Division.

The instant cause was submitted to the Second Division as a pure question of local civil procedure, namely, whether

the declaratory judgment provision of the Illinois Civil Practice Act (Ill. Rev. Stat., 1959, Chap. 110, Sec. 57.1) (Petitioner's Appendix G, pp. 41a-42a) could properly be substituted for the traditionally adequate remedies of garnishment and policy suits. On authority of previously decided Illinois and Michigan cases, the Second Division agreed that Petitioner's attempted substitution of remedies was improper (Petitioner's Appendix A, pp. 1a-20a). It is this decision that Petitioner would ultimately have this Court reverse, after re-construing the declaratory judgment statute to suit Petitioner's fancy.

After the Second Division filed its opinion on April 4, 1961, Petitioner had fifteen days in which to seek rehearing (Respondents' Appendix A, p. 1a). Had Petitioner elected this course, the apparent divergence between the Second Division's decision and the First Division's decision in the *Janusick* case would have come to light of both Petitioner and the two divisions of the court. Instead, with fifteen days' rehearing time plus forty days' appeal time to expend (see Respondents' Appendix B, p. 2a), Petitioner elected to seek review in the Illinois Supreme Court. In short, Petitioner's own folly caused the Second Division to lose jurisdiction.

In petitioning the Illinois Supreme Court for review, Petitioner again set forth wholly nonfederal grounds for reversal. The Illinois Supreme Court, with no federal question before it, denied review without opinion (Petitioner's Appendix D, pp. 32a-33a).

Only thereafter did Petitioner disclose its awareness of the *Janusick* case and, in a belated attempt to be diligent, return to the Illinois Supreme Court with a motion

to reconsider that court's prior refusal of review (Petitioner's Appendix E, pp. 34a-38a). In this motion Petitioner alleged for the first time that, by virtue of the *Janusick* decision, the Second Division had deprived it of due process and equal protection of the law.

In light of the *Janusick* case's current status, concerning which the petition remains silent, Respondents believe that if a federal question can ever arise, that question can arise, only in the *Janusick* case, and only if and when the Illinois Supreme Court shall have been afforded an opportunity to review that case and shall thereafter have refused review. See *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. ed. 897, 903; *Parker* v. *County of Los Angeles*, 338 U.S. 327, 70 S. Ct. 396, 94 L. ed. 144. Even at that time the existence of a federal question would necessarily depend, not upon an apparent similarity in the factual pictures presented by the two cases, but rather upon an identity of the trial and appellate court records in each case. Since the record of the *Janusick* case is not before this Court, further attempts to compare or distinguish seem inappropriate.

Should the Illinois Supreme Court be afforded the opportunity and thereafter refuse to review the *Janusick* case, and should the trial and appellate court records of the two cases then be thought to be identical so as to give rise to a possible federal question, that federal question, if any, would inure, not to this Petitioner's benefit, but to the benefit of the losing party in the *Janusick* case. This Petitioner is not entitled to predicate its alleged right upon a case yet to be decided between strangers. *Milwaukee E. R. & L. Co.* v. *Wisconsin*, 252 U.S. 100, 40 S. Ct. 306, 64 L. ed. 476.

II. The Illinois Supreme Court order denying Petitioner's motion to reconsider denial of leave to appeal (Petitioner's Appendices E, pp. 34a-38a, and F, pp. 39a-40a) is not an essential part of the Second Division's decision (Petitioner's Appendix A, pp. 1a-20a) here sought to be reviewed. Nor did the Illinois Supreme Court pass upon any federal question in denying the motion (Petitioner's Appendix F, pp. 39a-40a) and, in light of what follows concerning the adequacy of state grounds to support the Second Division's decision, it cannot be said that the Illinois Supreme Court evaded any federal question. It is Respondents' position, accordingly, that the order denying the motion to reconsider (Petitioner's Appendix F, pp. 39a-40a) and the petition's claim of constitutional grievance by reason thereof, ought not to be considered by this Court.

III. It is further submitted that Petitioner's allegations of unconstitutionality (Petitioner's Appendix E, pp. 34a-38a) are mere naked assertions of a claim in respect of some constitutional right, which assertions, in the absence of a real and substantial controversy of the required character which deserves serious consideration, are entirely insufficient. *United States Fidelity and Guaranty Co.* v. *Oklahoma,* 250 U.S. 111, 39 S. Ct. 399, 63 L. ed. 876; *Ennis Waterworks* v. *Ennis,* 233 U.S. 652, 658, 34 S. Ct. 767, 58 L. ed. 1139, 1141.

Respondents also urge that Petitioner's attempt to wedge a so-called federal question into this record after the Second Division's decision on state grounds (Petitioner's Appendix A, pp. 1a-20a) and after the Illinois Supreme Court's approval on purely state grounds (Petitioner's Appendix D, pp. 32a-33a), came too late in the litigation to

permit of this Court's assumption of jurisdiction. *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 65 S. Ct. 1475, 89 L. ed. 2092; *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. ed. 231, 236.

II.

APART FROM THE LIMITATIONS OF 28 U.S.C.A., SEC. 1257 (3), THIS COURT WILL NOT REVIEW A STATE COURT DECISION WHOLLY SUSTAINABLE ON STATE GROUNDS.

This Court has repeatedly declined to review a state court decision unless it affirmatively appeared that there was no adequate state ground to support the decision. *Durley* v. *Mayo,* 351 U.S. 277, 281, 76 S. Ct. 806, 100 L. ed. 1178, 1183; *Stembridge* v. *Georgia,* 343 U.S. 541, 547, 72 S. Ct. 834, 96 L. ed. 1130; *Flournoy* v. *Wiener,* 321 U.S. 253, 64 S. Ct. 548, 88 L. ed. 708; *Lynch* v. *New York,* 293 U.S. 52, 55 S. Ct. 16, 79 L. ed. 191.

Without waiving their objection that the instant record contains no federal question, Respondents urge that this Court should decline jurisdiction inasmuch as the petition herein not only fails to show that the Second Division's decision (Petitioner's Appendix A, pp. 1a-20a) and the Illinois Supreme Court's refusal to review (Petitioner's Appendix D, pp. 32a-33a) were not predicated upon adequate state grounds but, on the contrary, the petition affirmatively shows that the decision and order denying leave to appeal were based wholly on adequate state grounds.

III.

THE INSTANT CAUSE LACKS THE "SPECIAL AND IMPORTANT" REASONS FOR REVIEW CONTEMPLATED BY RULE 19 OF THIS COURT.

Notwithstanding Petitioner's suggestion of great importance to the citizenry, this litigation possesses neither the "federal question" nor the "question of substance" required by Rule 19 (Respondents' Appendix C, p. 5a) nor those nationally momentous qualities that justify congesting this Court's docket. When all unnecessary and fallen-behind parties are eliminated, this cause is, in simplest form, a "principle" suit between insurance company and minor child, Valerey L. Stratton, the fight continuing only through obstinacy of counsel.

As this Court has indicated in *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. ed. 897, 901, in discussing Rule 19,—

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants" (Citations omitted).

Also apropos is the language of Mr. Chief Justice Taft, that:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of

opinion and authority between the circuit courts of appeal." *Layne and Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 67 L. ed. 712, 714.

IV.

ABSENT A SHOWING OF INTENTIONAL OR PURPOSEFUL DISCRIMINATION, NEITHER INCONSISTENT NOR ERRONEOUS JUDICIAL DECISIONS ARE VIOLATIVE OF THE FOURTEENTH AMENDMENT.

In what appears to be an allusion to a clear and intentional design or purpose to discriminate, Petitioner emphasizes that the decision herein (Petitioner's Appendix A, pp. 1a-20a) and the decision in the *Janusick* case (Petitioner's Appendix B, pp. 21a-29a) were both made by "the same Court." Respondents concede that both divisions of the Appellate Court (Second District) constitute the same court, but they fail to grasp a distinction between a divergence of opinions between two divisions of the same Appellate Court district on one hand, and a divergence of opinions between two Appellate Court districts or between two Federal Courts of Appeals, on the other hand.

This Court has stated in *Milwaukee E. R. & L. Co.* v. *Wisconsin*, 252 U.S. 100, 105, 40 S. Ct. 306, 64 L. ed. 476, 480:

> "• • • the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions (*Backus Jr. & Son* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 569, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445), any more than, in guaranteeing due process, it assures immunity from judicial error." (Citations omitted) (See also *Stein* v. *New York*, 346 U.S. 156, 73 S. Ct. 1077, 97 L. ed. 1522)
>
> "Unlike *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 L. ed. 520, and *Muhlker* v. *New York*, 197 U.S. 544, 49 L.

> ed. 872, 25 Sup. Ct. Rep. 522, where protection was afforded to rights acquired on the faith of decisions later overruled, the company seeks here to base rights on a later decision between strangers, which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound."

Directly in point is the language of *Backus Jr. & Son* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 18 S. Ct. 445, 42 L. ed. 853, 859, that:

> "* * * there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the state have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. The last adjudication cannot be set aside in the Federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws."

In *Snowden* v. *Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. ed. 497, this Court held that there must be a clear and intentional discrimination by state officers to constitute denial of equal protection, and this discriminatory purpose is not presumed.

The petition herein utterly fails to make out a case of clear and intentional purpose or design to discriminate, and the phraseology "intentional and invidious" and "whatever its motives," as applied to the Illinois Appellate and Supreme Courts, discloses nothing as to any such purpose or design. *Snowden* v. *Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. ed. 497.

CONCLUSION.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition should be denied with such sanctions and costs as this Court shall determine.

Respectfully submitted,

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APPENDIX A.

Appellate Court Rule 14

Ill. Rev. Stat. 1959, Chap. 110, Sec. 201.14. *Petitions for Rehearing.*

"Within 15 days after a decision is entered of record the party desiring a rehearing shall file with the clerk of this court 9 printed copies of the petition for rehearing, together with proof of service of 3 copies thereof upon the opposing party or his attorney. Upon written motion, supported by affidavit, showing good cause, made within 15 days after the filing of the opinion, or within any extensions thereof, the court or any judge thereof in vacation may extend the time for filing the petition for rehearing. The petition shall state concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the abstract, or record if the filing of an abstract has been excused, and brief relied upon. Reargument of the case shall not be made in the petition. The opposing party shall have 15 days from the granting of the rehearing to answer the petition, and the petitioner shall have 10 days to file his reply. Three copies of each shall be served on opposing counsel. When a rehearing is granted, the original briefs of the parties and the petition for rehearing, answer and reply, shall stand as briefs on the rehearing. Oral argument will be permitted only when ordered by the court on its own motion."

APPENDIX B.

Civil Practice Act, Sec. 75

Ill. Rev. Stat. 1959, Chap. 110, Sec. 75. *Jurisdiction of Appellate and Supreme Courts.*

"(1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, (b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning ordinance or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires.

"(2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject however, to the following exceptions: (a) in case a majority of the judges of the Appellate Court or of any branch thereof shall be of the opinion that a case decided by them involves a question of such importance, either on account of principal or collateral interest, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (b) In any

such case as is hereinbefore made final in the Appellate Courts it is competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the Supreme Court. (c) In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses the judgment or decree and remands the cause for a new trial or hearing, and in which the party in whose favor the trial court's judgment or decree was rendered presents to and files with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances than were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it is competent for the Supreme Court to grant leave to appeal from such final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section.

"Provided, however, the application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made within 40

days after the judgment of the Appellate Court has become final, either through the denial of a petition for rehearing or the expiration of the time within which a petition for rehearing might be filed; otherwise the power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist. Answers to such petitions for leave to appeal may be filed by respondent within 15 days after the expiration of the time for the filing of the petition for leave to appeal or within such further time as the Supreme Court or some Justice thereof in vacation may grant, if granting within such 15-day period. As amended 1959, July 21, Laws 1959, p. 1784, Sec. 1."

APPENDIX C.

Rule 19 of the Revised Rules of the Supreme Court of the United States

19.

Considerations Governing Review on Certiorari.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(Appendix)

"2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

SUPREME COURT, U. S.

FILED

SEP 27 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 306

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a minor; VALERY STRATTON, a minor; SAMUEL E. STRATTON; LORRAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,

Respondents.

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI.

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May It Please The Court:

Respondents state that they fail to grasp a distinction between a divergence of opinions between two divisions of the same Appellate Court on one hand, and a divergence of opinion between two Appellate Court districts or between two Federal Courts of Appeals on the other hand.

Respondents seemingly have fallen into that ever increasing group of persons and public officials who, through such lack of understanding or concern, would unwittingly permit a "chipping away" of those basic rights and liberties long guaranteed by the Constitution of the United States.

Smith-Hurd Illinois Ann. St., Chap. 37, Sec. 46 provides:

> "The said branch courts so constituted shall be severally known as the branch of the Appellate Court within and for the districts in which they may be constituted, and all determinations, orders, judgments and decrees of said branch courts, in cases so assigned to them by said Appellate Court, shall be entered upon the records of the Appellate Court to which the branch appertains, as determinations, orders, judgments and decrees of that Appellate Court. * * *"

From this, it is clear that all decisions of each division of an Appellate Court in Illinois is the decision of that Appellate Court. To say, therefore, that Petitioner was not, in the case at bar, deprived of equal protection of the law and due process of law is mere sophistry.

Granted that the Constitution does not guarantee uniformity of judicial decisions between different Appellate Court districts within a sovereign state, it does guarantee equal protection of the law and due process of law to parties similarly situated who come before the same court. These rights were not extended to the Petitioner in the instant case. This deprivation cannot be dismissed or rationalized by saying that it was the "left hand" and not the "right hand" of the same judicial body that dealt the death blow. This would be a distinction without a difference. Such reasoning relegates the Constitution to nothing but a historical piece of paper.

Respondents cynically criticize the Petitioner's timing in raising the federal question in this cause. It should be

obvious to Respondents that one will not cry out until he senses the pain. That is the case here. Petitioner did cry out when it first became aware that its constitutional rights had been deprivated. It then sought relief from the Illinois Supreme Court by raising the federal question in its Motion to Reconsider Denial of Petition for Leave to Appeal (Petitioner's Appendix E). This was Petitioner's only available remedy because Petitioner first became cognizant of the decision in the other cause of action subsequent to its time limit for filing a petition for rehearing in the Appellate Court and subsequent to the denial of its petition to the Illinois Supreme Court for leave to Appeal. The Illinois Supreme Court, though having the federal question before it, denied Petitioner relief (Petitioner's Appendix F). The federal question was timely presented. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 77 Law. Ed. 360, 367; 287 U.S. 358.

The fact remains that Petitioner was turned away by the Illinois Second District Appellate Court when at the same time another party, similarly situated, and in an almost identical fact situation was blessed. The action or inaction of the losing party in the other cause of action will have no bearing or effect on Petitioner's rights. The deprivation of its right to equal protection of the law and due process of law has already occurred. If the state judiciary has succeeded in discriminating between insurers as to which has a cause of action, it may likewise later discriminate between individual citizens who may appear before the courts. For this reason the present cause is important not only to the Petitioner but to the citizenry in general.

The instant case does not, as Respondents would want this Honorable Court to believe, involve just a suit between an insurance company and a minor child. It involves

something much more basic and fundamental. It involves the right of free and equal access to our Courts. If this right is denied or abridged, then the slow erosion and crumbling of the bulwark of free society which is based on laws, not men, commences.

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